No. 15429

United States
Court of Appeals
for the Ninth Circuit

H. P. WILLMAN, Doing Business as Poppers Supply Co.,

Appellant,

vs.

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as Premier Popcorn Company,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-15-57

No. 15429

United States
Court of Appeals
for the Ninth Circuit

H. P. WILLMAN, Doing Business as Poppers Supply Co.,

Appellant,

vs.

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as Premier Popcorn Company,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-15-57

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States District Court
for the District of Oregon

Civil No. 8500

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as PREMIER POPCORN COMPANY,

Plaintiffs,

vs.

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Defendant.

COMPLAINT

Plaintiffs, for cause of action against the Defendant, complain and allege:

I.

That at all times mentioned herein, the Defendant was, and now is, a resident, inhabitant and domiciliary of the State of Oregon, and was, among other things, engaged in business as a popcorn jobber under the name and style of Poppers Supply Co., and maintained on file in the records of the County Clerk of Multnomah County, Oregon, an assumed business name certificate as required by law.

II.

That at all times mentioned herein the Plaintiffs were and now are co-partners engaged under the

In the United States District Court
for the District of Oregon

Civil No. 8500

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as PREMIER POPCORN COMPANY,

Plaintiffs,

vs.

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Defendant.

COMPLAINT

Plaintiffs, for cause of action against the Defendant, complain and allege:

I.

That at all times mentioned herein, the Defendant was, and now is, a resident, inhabitant and domiciliary of the State of Oregon, and was, among other things, engaged in business as a popcorn jobber under the name and style of Poppers Supply Co., and maintained on file in the records of the County Clerk of Multnomah County, Oregon, an assumed business name certificate as required by law.

II.

That at all times mentioned herein the Plaintiffs were and now are co-partners engaged under the

assumed name and style of Premier Popcorn Company in the State of Illinois in the business of processing and selling popcorn to wholesalers and others. That the Plaintiffs are and were at all times mentioned herein residents, inhabitants and domiciliaries of the State of Illinois.

III.

This is a civil action between citizens of different states, where the matter in controversy exceeds $3,000.00 exclusive of interest and costs. [1*]

IV.

That on or about May 11, 1953, the Defendant, in writing, contracted to buy from Plaintiffs, and Plaintiffs, in said writing, contracted to sell to Defendant, for future delivery, 7,200 one hundred pound bags of S. A. Yellow Hybrid Variety "Golden Rocket" Popcorn, warranted to pop 30 to 1 on the official volume tester, for the sum of $9.00 per hundred pounds, including bags, f.o.b. Watseka, Illinois.

V.

That the parties hereto mutually agreed, in writing, to the cancellation of so much of said contract as called for the purchase and sale of 3,600 one hundred pound bags of said corn.

VI.

That the Plaintiffs duly performed, and were, at all times mentioned herein, ready, willing and able

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

to duly perform, all of the conditions and promises on their part of said contract to be performed.

VII.

That the Defendant, prior to April 14, 1954, and subsequent to May 11, 1953, breached, repudiated and renounced the aforementioned contract to purchase 3,600 one hundred pound bags of popcorn, and as a direct result and consequence of said breach, Plaintiffs suffered damage in the sum of $11,700.00.

Wherefore, Plaintiffs demand judgment against Defendant for the sum of $11,700.00, and for their costs and disbursements incurred herein.

/s/ WM. E. TASSOCK,
Of Attorneys for Plaintiffs.

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause.]

ANSWER

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The plaintiffs are not the real parties in interest and not the proper parties plaintiff.

Third Defense

The defendant admits the allegations contained in Paragraph I of the Complaint; alleges that he is without knowledge or sufficient information to form a belief as to the truth of the allegations contained in Paragraph II of the Complaint; and denies each and every other allegation contained in the Complaint except so much thereof as is set forth in the defendant's affirmative defense.

Fourth Defense

Plaintiffs' Complaint is not based on any of the remedies to which they are limited by the contract allegedly breached.

Fifth and Affirmative Defense

I.

That on or about May 11, 1953, the defendant, in writing, contracted to buy and the plaintiffs contracted to sell 7,200 100 lb. bags of S. A. Yellow Hybrid variety "Golden Rocket" popcorn, for the sum of $9.00 per hundred pounds, including bags, f.o.b. Watseka, Illinois. [2]

II.

That the parties hereto mutually agreed to reduce the quantity of popcorn ordered from 7,200 100-lb. bags to 3,600 100-lb. bags.

III.

That the parties hereto further mutually agreed to reduce the price per 100 lbs., including bags, from $9.00, as aforesaid, to $8.00.

IV.

That on or about January 5, 1954, the defendant ordered from the plaintiffs and gave shipping instructions for 1,200 100-lb. bags of the aforesaid popcorn at the mutually agreed price of $8.00, but the plaintiffs failed and refused to ship any popcorn in response to the said order; and the defendant again, on or about February 2, 1954, ordered, and gave shipping instructions, in writing, to the plaintiffs for 3,600 100-lb. bags of the said popcorn at the mutually agreed price of $8.00, but the plaintiffs failed and refused to ship any of the said popcorn and ignored the orders and shipping instructions of the defendant.

V.

That the defendant duly performed all the conditions of the contract on his part to be performed.

Wherefore, defendant demands that the Complaint be dismissed and that defendant recover his costs and disbursements incurred herein.

/s/ J. P. STIRLING,

/s/ JOHN F. REYNOLDS,
Attorneys for Defendant.

Defendant demands trial by jury under Rule 38 (b).

/s/ J. P. STIRLING,
Of Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed March 22, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Nature of the Case

This is an action commenced by the plaintiff sellers for damages for alleged breach of contract by the defendant purchaser. The defendant denies that he has breached the contract, but contends the contract was revised.

Agreed Facts

1. That at all times mentioned herein the defendant was and now is a resident, inhabitant and domiciliary of the State of Oregon, and was, among other things, engaged in business as a popcorn jobber under the name and style of Poppers Supply Company, and maintained on file in the records of the County Clerk of Multnomah County, an assumed business name certificate as required by law.

2. That at all times mentioned herein the plaintiffs were and now are co-partners engaged in the State of Illinois in the business of processing and selling popcorn to wholesalers and others under the assumed name and style of Premier Popcorn Company. That the plaintiffs are and were at all times mentioned herein residents, inhabitants and domiciliaries of the State of Illinois.

3. That this is a civil action between citizens of different states where the amount in controversy exceeds $3,000, exclusive of interests and costs.

4. That on or about May 11, 1953, the defendant, in a writing herein referred to as Exhibit I, contracted to buy 7,200 one hundred-pound bags of S. A. Yellow Hybrid Variety "Golden Rocket" Popcorn for the sum of $9.00 per hundred pounds, including bags, f.o.b. Watseka, Illinois.

5. That after May 11, 1953, and prior to May 21, 1953, the plaintiffs, [3] acting by and through H. M. Alver, executed said contract, Exhibit I, in Watseka, Illinois, and did thereby agree to sell said popcorn.

6. On May 20, 1953, plaintiffs, by H. M. Alver, composed, executed and deposited in the United States Post Office in Watseka, Illinois, Exhibit II, which letter was received in due course by defendant.

7. That on or about October 12th, and/or 13th, and/or 14th, 1953, the defendant and H. M. Alver conferred in Chicago. That the defendant and H. M. Alver subsequently had a conversation in Portland, Oregon, in November, 1953.

8. On or about October 23, 1953, a long distance telephone conversation was had between H. P. Willman, who was then and there in Portland, Oregon, and H. M. Alver, who was then and there in Watseka, Illinois.

9. That on October 23, 1953, the plaintiffs composed, executed and deposited in the United States Post Office in Watseka, Illinois, Exhibit III, a let-

ter which was received in due course of mail by the defendant.

10. That on December 15, 1953, the defendant composed, executed and deposited in the United States Post Office in Portland, Oregon, Exhibit IV, a letter which was received in due course of mail by the plaintiffs.

11. That on December 16, 1953, the plaintiffs composed and deposited in the United States Post Office in Watseka, Illinois, Exhibit XIII, a letter which was received in due course of mail by the defendant.

12. On December 22, 1953, the plaintiffs composed and executed Exhibit V, a letter with invoice No. 3093 attached, which was mailed at Watseka, Illinois, on January 2, 1953, via air mail, and received by the defendant in Portland, Oregon, on January 4, 1954.

13. That on January 5, 1954, a telephone conversation was had between H. M. Alver, who was then and there in Watseka, Illinois, and H. P. Willman, who was then and there in Portland, Oregon, and on the same day H. M. Alver composed, executed and deposited with the Post Office in Chicago, Illinois, Exhibit VI, a letter, via air mail, which was received in due course of mail by the defendant.

14. On January 11, 1954, the plaintiffs received in the mail at Watseka, Illinois, Exhibit VII, defendant's Purchase Order No. 1856.

15. Prior to January 28, 1954, plaintiffs retained Malcolm H. Clark, an attorney of Portland, Oregon, to represent them. That on January 28, 1954, Malcolm H. Clark composed, executed and deposited in the Post Office in Portland, Oregon, Exhibit VIII, a letter which was in due course of mail received by defendant.

16. That on or about January 28, 1954, defendant, in Portland, Oregon, talked to plaintiffs' office, in Watseka, via telephone.

17. That on January 28, 1954, the plaintiffs composed, executed and deposited in the Post Office in Watseka, Illinois, via air mail, Exhibit IX, a letter, which was received in due course of mail by the defendant.

18. That on February 2, 1954, J. P. Stirling, an attorney at law, pursuant to authority and direction of the defendant, composed, executed and deposited in the Post Office in Portland, Oregon, Exhibit X, a letter which was received in due course of mail by Malcolm H. Clark, and to which was attached a copy of Purchase Order No. 1867, mentioned below.

19. That on or about February 2, 1954, the defendant composed and deposited in the Post Office at Portland, Oregon, Exhibit XI, Purchase Order No. 1867, directed to plaintiffs, which was received by plaintiffs on February 4, 1954.

20. On February 11, 1954, defendant sent a telegram to plaintiffs, which telegram was received by

plaintiffs in due course, and which is Exhibit XII.

21. That on or about February 15, 1954, plaintiffs mailed to defendant their invoice No. 3153, which invoice was received by defendant (Exhibit XIV).

22. That, prior to the contract of May 11, 1953 (Exhibit I), plaintiff and defendant had a previous written contract for the shipment of corn, dated December 31, 1952, which contract is referred to as Exhibit XV.

23. Defendant gave no shipping instructions under this contract at the $9.00 price, and plaintiffs shipped no corn thereunder at the $8.00 price.

24. That the writings referred to herein as Exhibits I through and including XIX are attached to a "Stipulation" concerning Exhibits entered into by the parties, and on file herein, by the terms of which it is admitted that said exhibits are genuine and are what they purport to be and that all or any of said Exhibits may be, without objection, introduced into evidence by either party at the time of and during trial, except as therein stated.

Plaintiffs' Contentions

I.

That plaintiff was at all times ready, willing, and able to ship to defendant popcorn of the kind, quality and quantity referred to in Exhibit I, at the price of $9.00 per hundred pounds, including bags, f.o.b. Watseka, Illinois.

II.

That defendant breached the contract of May 11, 1953, by:

(1) Failing, within a reasonable time after January 4, 1954, to order from plaintiffs, or pay for, any popcorn of the type and kind covered by the contract at the contract price of $9.00 per cwt. f.o.b. Watseka, Illinois, and/or

(2) By repeatedly asserting, subsequent to receipt of written notice from plaintiffs that the contract price of $9.00 per cwt. f.o.b. Watseka, Illinois, would not be altered, a right under the contract to purchase said corn at a price of $8.00 per cwt. f.o.b. Watseka, Illinois, and/or

(3) By renunciating and repudiating the contract of May 11, 1953.

III.

That the market price of popcorn of the type and quality covered by the contract of May 11, 1953, was at the times indicated as follows:

October, 1953—$8.00 per cwt., including bags;
November, 1953—$8.00 per cwt., including bags;
December, 1953—$7.00 per cwt., including bags;
January, 1954—$6.50 per cwt., including bags;
February, 1954—$6.00 per cwt., including bags;
March, 1954—$6.00 per cwt., including bags;
April, 1954—$5.50 per cwt., including bags;
May, 1954—$5.50 per cwt., including bags;
June, 1954—$5.00 per cwt., including bags;
July, 1954—$5.00 per cwt., including bags;

August, 1954—$7.00 per cwt., including bags;
September, 1954—$7.00 per cwt., including bags.
All prices f.o.b. Watseka, Illinois.

IV.

That by virtue of defendant's breach as aforesaid, plaintiffs are entitled to recover damages computed at:

(1) The difference between the contract price and the market price prevailing for 600 100-lb. bags for each of the months of January, February, March, April, May and June of 1954.

or

(2) The difference between the contract price and the market price for 600 100-lb. bags of popcorn of the kind covered by the contract for each of the months of October, November, December, 1953, and January, February and March, 1954.

V.

That no one, by the authority of the plaintiffs, orally stated that the $9.00 per cwt., including bag, price, quoted for the popcorn in the May 11th contract would be reduced to $8.00.

VI.

That any such oral statement, if made, would not be enforceable for the reason that the same is in violation of the Statute of Frauds of the Uniform Sales Act, ORS Sec. 75.040.

VII.

That any such oral statement would also be unenforceable for the reason that no consideration was given to support any promise implicit in such a statement to sell the corn for a price lower than that expressed in the contract.

VIII.

The plaintiffs deny each contention of the defendant.

Defendant's Contentions

I.

That plaintiffs are not the real parties in interest and not proper parties to the complaint, in that the proceeds of any such claims as this have been set over to creditors of the plaintiff by the United States District Court for the Eastern District of Illinois in a proceeding for an arrangement filed by the plaintiffs herein and bearing file No. 4028-D. (Reference Exhibits XVI, XVII, XVIII and XIX.)

II.

Plaintiffs' complaint fails to state a cause of action in that it does not seek to enforce any of the remedies to which plaintiff is limited by the contract.

III.

That plaintiffs were not able to ship to the defendant, popcorn of the kind and quality referred to in said contract at the times therein provided for.

IV.

That the plaintiff and defendant mutually rescinded the contract of May 11, 1953, and mutually agreed to enter into a contract at price of $8.00 per hundred pounds; and that the defendant fully complied with all terms of the said contract, by ordering from the plaintiff all of the corn covered by the said contract, but the plaintiff breached the said contract, by ignoring the aforesaid orders from this defendant, and by failing to ship any corn to the defendant.

V.

That the plaintiff and defendant mutually agreed to revise the said contract of May 11, 1953, by reducing the price thereon from $9.00 to $8.00 per 100 lb. bag of corn, f.o.b. Watseka, Illinois; that the defendant fully complied with the mutually revised contract by ordering 3,600 100-pound bags of corn from the plaintiff at $8.00 per 100-lb. bag, but the plaintiffs breached the said mutually revised contract by ignoring the aforesaid orders from the defendant, and by failing to ship the defendant any corn whatsoever.

VI.

By holding the contract in abeyance (Exhibit III) until the end of December (Exhibit V), plaintiffs waived any right to enforce performance of the contract as to the first three months thereof or as to 1,800 bags. Plaintiffs' damages, if any, are limited to the balance of the contract, being three months shipments or 1,800 bags.

VII.

Under the doctrine of mitigation of damages, plaintiffs were required to accept defendant's offer to purchase corn at $8.00, and if plaintiffs are entitled to any damages, they are limited to $1.00 per bag.

VIII.

Defendant denies each contention of plaintiffs.

Issues

I.

In what amount, if any, is the defendant liable to the plaintiffs?

Exhibits

Exhibit No.

I. Described in admitted fact 4.
II. Described in admitted fact 6.
III. Described in admitted fact 9.
IV. Described in admitted fact 10.
V. Described in admitted fact 12.
VI. Described in admitted fact 13.
VII. Described in admitted fact 14.
VIII. Described in admitted fact 15.
IX. Described in admitted fact 17.
X. Described in admitted fact 18.
XI. Described in admitted fact 19.
XII. Described in admitted fact 20.
XIII. Described in admitted fact 11.
XIV. Described in admitted fact 21.
XV. Described in admitted fact 22.

XVI. Original Arrangement proposed by Debtors, dated July 1, 1955.

XVII. Order pertaining to above Arrangement, dated August 17, 1955.

XVIII. Amended Arrangement, dated September 10, 1955.

XIX. Order confirming Amended Arrangement, dated September 27, 1955.

It Hereby Is Ordered that the foregoing constitutes the pre-trial order in the above cause and that it supersedes the pleadings and that said pre-trial order should not be amended during the trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 4th day of December, 1956.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

The foregoing form of pre-trial order is hereby approved.

/s/ JOHN F. REYNOLDS,
Of Attorneys for Defendant.

/s/ WILLIAM E. TASSOCK,
Of Attorneys for Plaintiffs.

Lodged May 21, 1956.

[Endorsed]: Filed December 4, 1956.

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated and Agreed between the parties hereto, acting through their attorneys, that the Exhibits marked I through XIX, which Exhibits are attached hereto, are genuine and what they purport to be, are either the originals or true copies thereof, and that all or any of said Exhibits may be, without objection detached from this Stipulation, and introduced into evidence by either party at the time of the trial of the above case, except that plaintiffs reserve the right to object to the relevancy of Exhibits XVI, XVII, XVIII and XIX.

/s/ WILLIAM E. TASSOCK,
Of Attorneys for Plaintiffs.

/s/ JOHN F. REYNOLDS,
Of Attorneys for Defendant.

[Title of District Court and Cause.]

PLAINTIFFS' REQUESTED INSTRUCTIONS

I.

It is admitted that plaintiffs and defendant entered into the contract of May 11, 1953. It is also admitted that the defendant did not order any popcorn at the $9.00 price as provided in the contract.

The defendant, as a matter of law, has not established that the $9.00 price stated in the contract was

lowered, nor has the defendant established that the contract was rescinded.

You are therefore instructed to find your verdict for the plaintiffs if you find that the plaintiffs were ready, willing and able to perform their duties under the contract.

The amount of the verdict is to be determined from the instructions that I give you concerning the measure of damages and the evidence pertaining to damages presented in this case.

Authority:

The price of chattels agreed upon in a contract within the statute of frauds cannot be modified by a subsequent oral agreement.

Osborn v. Deforce,
122 Or. 360, 257 P. 685.

"Williston on Contracts,"
Sec. 593, N. 1, p. 1705.

"Williston on Sales,"
Sec. 71 (d).

A.L.I. Rest. of Law of Contracts,
Sec. 223(2).

See Cases collected, 17 ALR 9, 29 ALR 1095, 80 ALR 539, 118 ALR 1511. [5]

True a contract within the statute may be orally rescinded; however, there is no evidence that these parties intended to rescind the original contract unless this intention is to be presumed, as a matter

of law, from the evidence that the parties entered into a subsequent oral agreement changing the terms of the original contract. If this presumption exists, the rule prohibiting oral modification of contracts within the statute does not exist, because such a presumption would operate in every case. Furthermore, according to Williston on Contracts, Section 593, an oral rescission which is to be effected only as a part of an entire agreement to substitute a new oral agreement is ineffective. There is no writing signed by the plaintiffs evidencing the alleged contract.

II.

(Requested in the event No. 1 above is refused.)

The defendant, as a defense to plaintiffs' action, is contending that the parties agreed to lower the price provided in the contract of May 11, 1953, and that plaintiffs failed to perform this agreement.

In view of the evidence presented in this case and the law applicable thereto, I instruct you that any such agreement is no defense to plaintiffs' claim.

Authority:

The price of chattels agreed upon in a contract within the statute of frauds cannot be modified by a subsequent oral agreement. Dozens of cases collected in 17 A.L.R. 9, 29 A.L.R. 1095, 80 A.L.R. 539, 118 A.L.R. 1511, and A.L.I. Rest. of Law of Contracts, Sec. 223(2).

True a contract within the statute may be orally rescinded; however, there is no evidence that these

parties intended to rescind the original contract unless this intention is to be presumed, as a matter of law, from the evidence that the parties entered into a subsequent oral agreement changing the terms of the original contract. If this presumption exists, the rule prohibiting oral modification of contracts within the statute, does not exist, because such a presumption would operate in every case.

There is no writing signed by the plaintiffs evidencing the alleged contract.

III.

If you find that the time of delivery of the popcorn stipulated in the original contract of May 11, 1953, was extended for an indefinite time by the mutual consent of the parties and for their mutual benefit, or as the result of leniency by the seller, or at the request of the buyer, and you also find that the plaintiffs later requested that defendant take shipment and that the defendant refused and repudiated the contract, clearly indicating his intention not to perform it, the damage to the plaintiffs is the difference between the contract price and the market price at the time defendant, by his conduct, indicated that he refused to take delivery of any corn under the contract of May 11, 1953, and repudiated the contract.

Authority:

Where the delivery time stated in a contract is, by mutual consent or acquiescence of the buyer, or

leniency of the seller, extended for an indefinite period, the measure of damages for buyer's failure to buy is the difference between the contract price and the market price at the time and place of the buyer's refusal to accept delivery in response to seller's demand that he do so.

Vol. 2, Williston on Contracts,
Sec. 596 N. 1.

Kutztown Foundry & M. Co. v. Sloss-Sheffield S. & I. Co., 279 F. 627.

James River Lumber Co. v. Smith Bros.,
116 S.E. 241.

News Pub. Co. v. Denison-Pratt,
117 S.E. 920.

Fitchbury Yarn Co. v. Hope Webbing Co.,
127 A. 148.

Teuscher v. Utah-Idaho Flour & Grain Co.,
221 P. 1096.

IV.

If you find that the defendant did not consent to an extension of the time for shipment or delivery of the popcorn as such times are stated in the contract, and if you find that the defendant simply refused to take delivery of any popcorn at the price stated in the contract and at the times stated in the contract, the damage to the plaintiffs is the difference beween the contract price and the market price prevailing at the times stated in the contract.

In this connection I call to your attention the

fact that it is admited in this case that the defendant was under no obligation to take any corn the last six months stated in the contract.

V.

(Requested in the event numbers III and IV are refused)

If you determine from the evidence and the instructions that I have previously given you that the defendant is liable to the plaintiffs, you must then proceed to determine plaintiffs' damages, if any.

If you find in seeking to determine plaintiffs' damages, if any, that the time of delivery of the popcorn stipulated in the original contract of May 11, 1953, was extended for an indefinite time by the mutual consent of the parties and for their mutual benefit, or as the result of leniency by the seller, or at the request of the buyer, and you also find that the plaintiffs later requested that defendant take shipment and that the defendant refused and repudiated the contract, clearly indicating his intention not to perform it, the damage to the plaintiffs is the difference between the contract price and the market price at the time defendant, by his conduct, indicated that he refused to take delivery of any corn under the contract of May 11, 1953, and repudiated the contract.

If, however, in seeking to determine plaintiffs' damages, if any, you find that the defendant did not consent to an extension of the time for shipment or delivery of the popcorn as such times are

stated in the contract, and if you find that the defendant simply refused to take delivery of any popcorn at the price stated in the contract and at the times stated in the contract, the damage to the plaintiffs is the difference between the contract price and the market price prevailing at the times stated in the contract.

In this connection I call to your attention the fact that it is admitted in this case that the defendant was under no obligation to take any corn the last six months stated in the contract.

(Note: See authorities under III, supra.)

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS

The defendant respectfully requests the court to instruct the jury as follows: [6]

Defendant's Requested Instruction No. ....

A written contract may be rescinded and superseded by a new contract by the express or implied agreement of the parties, and, likewise, a written contract may be modified by subsequent agreement of the parties.

This rescission or modification may be oral or partly oral and partly written, even though the original contract be in writing. Therefore if you

find that the plaintiffs' letter of October 23, 1953, and the oral conversations of the parties, either taken separately or considered together, amounted to a recission of the original contract and the making of a new contract at a price of $8.00, or a modification of the old contract so that the price was changed to $8.00, then you must find your verdict against the plaintiffs and for the defendant, for it is uncontradicted that defendant offered to buy corn at $8.00.

Dorsey v. Tisbey,
192 Or. 163, 173.

Wyllie China Co. v. Venton,
97 Or. 350, 363-4.

Defendant's Requested Instruction No. ....

With respect to a contract for future delivery of merchandise, the rule of general damages is that on refusal of the buyer to take the property, the seller is entitled to recover the difference between the contract price and the lesser market value of the goods at the time and place of delivery. Therefore if you find that the original contract was neither rescinded nor modified, and that the defendant breached the contract, then the maximum amount which plaintiff would be able to recover would be the difference between the contract price of $9.00 per hundred pound bag and the market price during October, November and December, 1953, and January, February and March, 1954, computed on 600 bags for each of those months, except, however,

that plaintiff was required to mitigate his damages, as stated in other instructions.

Rose v. U. S. Lumber & Box Co.,
108 Or. 237, 248, 215 Pac. 171.

Defendant's Requested Instruction No. ....

The law imposes upon a party injured by another's breach of contract the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. Therefore, if you find that the defendant made a bona fide offer to buy corn at $8.00 per bag, then that may be taken into your consideration in assessing damages, if you find that plaintiff is entitled to any damages. Thus if you find that defendant was required to accept 1,800 bags, or 3 monthly installments, under the contract, plaintiff's damages would therefore be limited to $1.00 per bag, or $1,800.00. If you find that defendant was required to accept 3,600 bags, then the damages, under this theory, would amount to $3,600.00.

Stillwell v. Hill,
87 Or. 112, 123, 126, 169 Pac. 1174.

Borden & Cox v. Vinegar Bend Lumber Co.,
2 Ala. App. 354, 56 So. 775.

Caulter v. B. F. Thompon Lbr. Co.,
142 Fed. 706.

Arkansas & T. Grain Co. v. Young,
96 S.W. 142 (Ark.).

Defendant's Requested Instruction No. ....

If you find that the original contract was neither modified nor rescinded, then you must consider the quantity of corn which defendant was required to accept under the original contract. The words "in abeyance" as used in plaintiffs' letter of October 23, 1953, mean: "Temporarily inactive, suspended or suppressed; temporarily without manifest existence" or "a condition of being undetermined." Since the plaintiffs' letter terminating the period of abeyance did not reach defendant until the time for performance had passed as to the first three months, you must limit your consideration of damages to the last 3 cars, or 1,800 bags of corn.

> Webster's New International Dictionary, 2nd Add., 1 Words and Phrases 75, citing Fenn v. Amer. Rattan & Reed, 130 N.E. 129, 75 Ind. App. 146.

If the Court declines to give the above-requested instruction, then defendant requests the following instructions:

If you find that the original contract was neither modified nor rescinded, and if you do not limit plaintiffs' damages to $1.00 per bag, then you must consider the measure of damages based on market value, and since the market price was falling, it will make a difference as to what months you use. In this connection I instruct you that when plaintiff notified defendant that the contract could no longer remain in abeyance, the legal effect of this was to

place the parties back in their original position. and you should start with the market price in October, 1953, and use the market price for each succeeding month to compute the damages as to each 600-bag car.

Clayton Oil Refining Co., v. Langford,
293 S.W. 559.

Stillwell v. Hill,
87 Or. 112, 126.

In the United States District Court
for the District of Oregon

Civil No. 8500

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as PREMIER POPCORN COMPANY,

Plaintiffs,

vs.

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Defendant.

JUDGMENT

The above-entitled action having come on regularly for trial before the undersigned Judge of the

above-entitled Court on this 5th day of December, 1956, plaintiff, Harold M. Alver, appearing in person and by his attorney of record, William E. Tassock, and the defendant appearing in person and by his attorneys, J. P. Stirling and John F. Reynolds; and after the jury was duly impanelled and sworn, opening statements were heard and evidence and exhibits were offered by both parties, arguments being made by counsel, at the conclusion of which the Court duly instructed the jury, and on the 5th day of December, 1956, the jury returned its verdict reading as follows, title and caption omitted:

> "We, the jury in the above-entitled matter, find our verdict for the plaintiffs in the sum of $10,800.00.
>
> "Dated at Portland, Oregon, this 5th day of December, 1956.
>
> "SALLY CARPENTER,
> "Foreman."

and the verdict was duly filed in the above-entitled cause upon which the plaintiffs moved for a judgment.

Now, Therefore, It Is Considered, Ordered and Adjudged that the plaintiffs have and recover of said H. P. Willman, doing business as Poppers Supply Co., the sum of $10,800.00, together with plaintiffs' costs and disbursements incurred herein amounting to the sum of $121.35.

Dated this 5th day of December, 1956.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed December 10, 1956. [7]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above-named plaintiffs, Harold M. Alver, Oscar J. Alver, Raymond N. Alver, Lucile M. Alver, Jeannette B. Alver and Mildred M. Alver, and to W. E. Tassock, and Clark & Clark, their Attorneys:

Notice is hereby given that H. P. Willman, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action in the United States District Court for the District of Oregon, on December 5, 1956.

Dated at Portland, Oregon, this 3rd day of January, 1957.

/s/ J. P. STIRLING,
Of Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed January 3, 1957. [11]

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL SUPERSEDEAS

Whereas, H. P. Willman, doing business as Poppers Supply Co., in the above-entitled action, appeals to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered against the defendant in the said action in the District Court, in favor of the plaintiffs in the said action and against the defendant on the 5th day of December, 1956, for Ten Thousand Eight Hundred and No/100 Dollars ($10,800.00) damages, and Sixty-two and 20/100 Dollars ($62.20) costs and disbursements.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, of Baltimore, Maryland, a corporation organized and empowered under the laws of the State of Oregon to become surety upon bonds, undertakings, etc., in the State of Oregon, does hereby jointly and severally undertake and promise, on the part of the appellant, that the appellant will pay all damages, costs and disbursements which may be awarded against it on appeal,

And, Whereas, the appellant is desirous of staying the execution of the said judgment so appealed from, it does further, in consideration thereof, and of the premises, jointly and severally undertake and promise that if the said judgment appealed

from, or any part thereof, be affirmed, the appellant will satisfy it so far as affirmed.

[Seal] THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ ROBERT B. CUMMING,
Attorney-in-Fact and
Resident Agent.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed January 4, 1957. [12]

[Title of District Court and Cause.]

ORDER

This matter coming on regularly for hearing upon the motion of the defendant for an Order authorizing and directing the Clerk of this Court to transmit to the United States Court of Appeals for the Ninth Circuit, all of the Exhibits introduced at the trial of the above-entitled cause, and it appearing to the Court that it is impracticable to print said Exhibits and the Court being fully advised,

It Is Hereby Ordered that the Clerk of the United States Court for the District of Oregon be and he hereby is authorized and directed to transmit to the United States Court of Appeals for the Ninth Circuit, all of the Exhibits introduced at the trial of the above-entitled cause.

Dated in open Court this 9th day of January, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed January 9, 1957. [14]

United States District Court
District of Oregon

Civil No. 8500

HAROLD M. ALVER, OSCAR J. ALVER, RAYMOND N. ALVER, LUCILE M. ALVER, JEANNETTE B. ALVER and MILDRED M. ALVER, a Co-partnership Doing Business as PREMIER POPCORN COMPANY,

Plaintiffs,

vs.

H. P. WILLMAN, Doing Business as POPPERS SUPPLY CO.,

Defendant.

Before: Honorable Claude McColloch, Chief Judge.

Appearances:

WILLIAM E. TASSOCK,
Of Attorneys for Plaintiffs.

JOHN F. REYNOLDS, and
J. P. STIRLING,
Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS
December 4, 1956

(A jury was duly and regularly empaneled and sworn, counsel for the respective parties made opening statements to the jury, and thereafter the following occurred:)

HAROLD M. ALVER

one of the Plaintiffs herein, was produced as a witness in behalf of Plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tassock:

Q. Mr. Alver, you are one of the plaintiffs in this action, aren't you? A. Yes; I am.

Q. Where do you reside, sir?

A. In Watseka, Illinois.

Q. Where is Watseka, Illinois?

A. About 100 miles south of Chicago, in the farming area, in the corn belt of Illinois.

Q. What is your occupation?

A. Popcorn processor.

Q. Popcorn processor? A. Yes.

Q. With whom are you employed?

A. We are six partners, three brothers and their wives, or six altogether. [2*]

Q. It has been stipulated in this case that you do business in Illinois under the name of Premier Popcorn Company. Now, how long have you been engaged in this occupation as a processor?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harold M. Alver.)

A. Over twenty years.

Q. Could you describe for the jury what the nature of the Premier Popcorn Company's operations were in 1953 and '54. How did you carry on business?

A. We were operating as a popcorn processing plant. In the spring of the year we went out to various farmers and contracted with them for acreage of popcorn to be grown during the summer months and delivered to us in the fall of the year at a fixed price. At the same time in the spring of the year, while we were contacting these farmers, we were also contacting our customers and selling them corn under a contract for delivery to start in the fall of the year at the same time that the farmers were harvesting and bringing us the crop.

Mr. Tassock: It has been stipulated here in the pretrial order, your Honor, that on or about May 11, 1953, the defendant contracted in a writing which has been marked as Plaintiff's Exhibit 1 to buy 7,200 100-pound bags of S. A. Yellow Hybrid Variety "Golden Rocket" popcorn for the sum of $9.00 per 100 pounds, and that the plaintiffs prior to May 21, 1953, also signed Exhibit No. 1 and agreed to sell this popcorn. [3]

At this time I would like to offer into evidence Plaintiffs' Exhibit No. 1.

The Court: Admitted.

(The sales contract referred to, dated May 11, 1953, was received in evidence as Plaintiffs' Exhibit 1.)

(Testimony of Harold M. Alver.)

Mr. Reynolds: The only thing I would like to call the Court's attention to is it shows on its face plus 25 cents for bags per 100 pounds. Otherwise, no objection.

Q. (By Mr. Tassock): Mr. Alver, Plaintiffs' Exhibit 1, the contract, refers to S. A. Yellow Hybrid Corn. I wonder if you would tell the jury what that is?

A. S. A. Yellow Hybrid Corn means a South American variety, which is a large grain yellow popcorn as distinguished from white hull-less, white grain popcorn.

Mr. Tassock: I wonder, your Honor, if at this time we could take the time to have the jury read this contract.

The Court: Not now. You can read these things later.

Q. (By Mr. Tassock): The contract bears the signature or purports to bear the signature of Mr. Herman Willman. Were you present when he signed it? A. Yes; I was.

Q. Where did that take place?

A. In Portland, in his office.

Q. Did Mr. Willman read the contract before signing it? [4] A. Yes; he did.

Q. I am going to read a part of the exhibit which pertains to the time of the shipment for the 7,200 bags covered by the contract. It says: "Time of shipment. Quantity, 600; time, October, 1953; quantity, 600, November, 1953; 600, December, 1953; 600, January, 1954; 600, February, 1954; 600, March,

(Testimony of Harold M. Alver.)

1954; 600, April, 1954; 600, May, 1954; 600, June, 1954; 600, July, 1954; 600, August, 1954; and 600 in September, 1954."

Now, this was signed in May. Was this one of those contracts where you agreed to sell corn that had not been grown? A. Yes.

Q. You also at that time had contracted with the farmer to buy the corn?

A. Yes; we had. At the same time we were contracting with farmers at a definite price.

Q. Now, at the time this contract was signed here in Portland, were there any discussions between you and Mr. Willman concerning any terms or conditions that are not stated in Plaintiffs' Exhibit 1?

A. Mr. Willman agreed to the deal and signed the contract. However, he asked that he be given an option to cancel the last six cars of corn if he wished to do so at a later date. I told Mr. Willman that I would discuss that with my partners and let him know, which I did, and I wrote him a letter at a [5] later date giving him the privilege of canceling the last six cars, starting in April.

Mr. Tassock: It is stipulated here that on May 20th, 1953, Mr. Alver wrote and subsequently the defendant received a letter which has been marked as Plaintiffs' Exhibit No. 2. I would like to ask at this time that this letter be introduced into evidence.

Mr. Reynolds: We have no objection, your Honor.

The Court: Admitted.

(Testimony of Harold M. Alver.)

(The letter referred to, dated May 20, 1953, was received in evidence as Plaintiffs' Exhibit 2.)

Mr. Tassock: If I may, your Honor, I would like to read this letter because it bears on just what we have been talking about.

The Court: You have already stated what is in there. You don't need to read it now. They know what it is. It confirms the privilege to cancel the last six cars.

Mr. Tassock: Yes; that is the letter confirming that he could cancel the last six cars.

Q. Was the 1953 crop of corn delivered to you as agreed by the farmers?

A. Yes; the farmers grew the crop and delivered to us in the fall of the year approximately 20,700,000 pounds of popcorn. [6]

Q. How much?

A. 20,700,000 pounds of shelled popcorn.

Q. It is stipulated here that after this letter of May 20th, which is Plaintiffs' Exhibit No. 2, your next contact of any kind with Mr. Willman here was about October 12th, 13th or 14th of 1953 in Chicago. What was the occasion for this meeting?

A. It was at a popcorn convention.

Q. Did you see and talk with Mr. Willman there? A. Yes; I did.

Q. Do you recall if the May, 1953, contract was discussed? A. Yes; it was.

(Testimony of Harold M. Alver.)

Q. Do you recall the nature of these discussions?

A. Shortly before the convention time the open market price of popcorn had dropped below the $9.00 contract price to about $8.00, and Mr. Willman asked me to give him some relief on that $9.00 contract price.

Q. Would you speak louder, please?

A. I told Mr. Willman I was surprised at his asking me for a price reduction on that contract, since we had just completed delivery of a year's supply of corn to him at a price of $9.00 at a time when the market price was $12.50, and that on the very first car of corn in October I didn't feel that we should immediately have to give him a price reduction because the market happened to drop below the [7] $9.00 price. He insisted, however, that I give him some relief, and I told him that I would go back to my partners in Watseka and discuss the matter with them and see if there was anything we could do for him, which I did.

Q. Was there anything else that was discussed at that time about changing the contract that you can remember? A. I believe not.

Q. Now, it is stipulated here that after the popcorn convention your next contact with Mr. Willman was on or about October 23rd 1953, where a long-distance telephone conversation was had when you were in Watseka, Illinois, and Mr. Willman when he was in Portland. Now, do you recall that the contract of May 11th, 1953, was discussed during

(Testimony of Harold M. Alver.)

that conversation? A. Yes; it was.

Q. Do you remember the general nature of what was said?

A. I called Mr. Willman regarding delivery of a car of corn that was left over from the previous year's contract. It was a car of corn that had sold to him for $12.50 in addition to his regular contract corn, and he asked me for a reduction in price on that particular car of corn. I gave him a $2.00 reduction because of the fact we were already in the new crop of corn and we were getting the new crop of corn cheaper. And then he asked me for a reduction on the May 11th contract from $9.00 to $8.00, which I refused to give him. However, I [8] told him that if he wanted to buy some $8.00 open market corn we would hold up delivery on the contract corn for the time being and sell him some $8.00 open market corn.

Q. Did he indicate that this was agreeable to him?

A. Yes; he felt that that would give him some relief.

Mr. Tassock: It is stipulated here that on October 23rd, 1953, you wrote and mailed to Watseka, Illinois, a letter which has been marked as Plaintiffs' Exhibit No. 3, which was received in due course by the defendant. I would like to offer and read this letter, your Honor.

The Court: Let's not read any letters so long as you can tell them what it is. It is admitted.

(Testimony of Harold M. Alver.)

(The letter referred to, dated October 23, 1953, was received in evidence as Plaintiffs' Exhibit 3.)

The Court: You tell them the subject of it if you think he has not explained it fully.

Q. (By Mr. Tassock): In that letter you confirm or purport to confirm the conversation, the telephone conversation—you referred to a telephone conversation in the letter. What I want to know is is that letter the same telephone conversation that you have just told the jury about? A. Yes.

Q. And in that letter you indicate that you will hold the contract in abeyance and sell him $8.00 corn on the open [9] market. Was that letter written in response to Mr. Willman's request here for some relief on the 1953 contract?

A. Yes. He said he couldn't take any $9.00 corn because of the market situation, and we made this offer to him, knowing that he would use more corn than was on the contract during the year, and if it would help him any we were glad to hold up delivery of the contract corn for a short time and sell him some $8.00 corn on the market.

Mr. Tassock: At a later point, your Honor, I am going to ask the Court to judicially note the meaning of the word "abeyance" as it appears in that letter.

Q. Now, it is stipulated that your next communication with Mr. Willman was at a meeting that

(Testimony of Harold M. Alver.)

you had with him in Portland, Oregon, in November of 1953. Do you recall the occasion for that meeting?

A. Yes. Mr. Willman complained on the quality of some corn we had shipped him, claiming that there was some white corn mixed in with it, and I came out to examine the corn. This was on the previous car on the last year's contract.

Q. That was the car of corn that was on the previous year's contract and had nothing to do with this year's contract? A. That is right.

Q. Was the May 11th, 1953, contract, Plaintiffs' Exhibit No. 1, discussed at this time in November?

A. Yes; it was. [10]

Q. Do you recall what was said and by whom?

A. Mr. Willman asked me for a price reduction in the contract. He wanted me to ship him some of the contract corn at $8.00 instead of $9.00, which I refused to do. I still said that he could buy some $8.00 open market corn if he wished. However, we insisted that he take out the 3,600 bags at $9.00 on the contract corn.

Q. Did you at that or any other time tell Mr. Willman that the contract price stated in Exhibit No. 1 would be lowered from $9.00 per hundredweight, which includes the bag, to $8.00 per hundredweight, including the bag? A. No; I did not.

Mr. Tassock: Now, it is stipulated that the next contact between you and Mr. Willman was a letter which has been marked here as Plaintiffs' Exhibit No. 4, which was written and mailed by the defendant in Portland, Oregon, on December 15th, 1953.

(Testimony of Harold M. Alver.)

This is a letter where he exercises the right to cancel the last six cars under the contract. The defendant wrote this letter to the plaintiff. I will offer this into evidence.

Mr. Reynolds: We have no objection.

The Court: Admitted.

(The letter referred to, dated December 15th, 1953, was received in evidence as Plaintiffs' Exhibit 4.) [11]

Mr. Tassock: It is further stipulated that the next communication between the plaintiffs and the defendant was a letter which is here marked as Plaintiffs' Exhibit 8. I wonder if I could have this number changed. It was already marked, your Honor, but I would like to have it remarked, if possible, so that we can keep the exhibits with the same numbers as in the pretrial order. Will you mark this as No. 5, please.

I started to say it is further stipulated here that the next communication between the plaintiffs and the defendant was a letter which has been marked here as Plaintiffs' Exhibit 5, which was written and mailed by the plaintiffs in Watseka, Illinois, on December 16, 1953. This letter is a letter where the plaintiffs inform the defendant that the company is going through an arrangement in the Federal Bankruptcy Court and that he knows the defendant is going to hear about it, and he wants him to know that they are still financially able to carry on business and still have their crop under control.

(Testimony of Harold M. Alver.)

This will be read to you at a later date more fully.

Mr. Reynolds: I wonder, Mr. Tassock, if that shouldn't be No. 13 instead of No. 8. It is so marked here. I think that, following the pretrial numbering system, it should be 13. [12]

Mr. Tassock: You are right. With the Court's permission, I would like to change the number to No. 13.

Mr. Reynolds: It has two numbers on it, but the number at the bottom is 13. That is the right number.

Mr. Tassock: That is Plaintiffs' Exhibit 13.

The Court: Admitted.

(The letter referred to, dated December 16, 1953, was received in evidence as Plaintiffs' Exhibit 13.)

Mr. Tassock: It is stipulated here that the next communication between these parties was a letter marked as Plaintiffs' Exhibit 5, written by the plaintiff on December 22nd, 1953. It was mailed on January 2nd, 1954, and was received by the defendant here on January 4th, 1954. This is a letter where the plaintiffs notified the defendant that they are not going to hold this contract in abeyance any longer, and they insist that the defendant order some corn at the $9.00 contract price.

Mr. Reynolds: We have no objection. I might note, however, that attached to it is an invoice from the plaintiffs. That is attached to the letter.

The Court: Admitted.

(Testimony of Harold M. Alver.)

(The letter referred to, with attached invoice, was received in evidence as Plaintiffs' Exhibit 5.) [13]

Q. (By Mr. Tassock): Do you recall that letter, Mr. Alver? A. Yes; I do.

Q. What circumstances prompted the writing of that letter?

A. We had received no shipping instructions whatsoever from Mr. Willman on either the $9.00 contract corn or had he given any purchase order for any open market $8.00 corn, and we felt we had waited long enough and we sent him that letter telling him we were no longer interested in selling any open market corn; that we wanted him to start taking out his contract corn.

Q. What happened after you sent the letter, Exhibit No. 5?

A. I had a telephone call from Mr. Willman on January 5th.

Q. Do you remember what was said, if anything, pertaining to this contract of May 11th?

A. Yes. Mr. Willman said that he would not pay $9.00 for any corn. And I said that we were going to insist that he pay $9.00 for that corn and start taking it out. He told me I could keep my damned corn and sue them and he would drag me through the courts for two or three years.

Q. It is stipulated here that on January 5th you wrote and mailed to the defendant a letter marked Plaintiffs' Exhibit 6. I would like to offer this letter

(Testimony of Harold M. Alver.)

into evidence, which is a letter where the plaintiffs asked the defendant to put his position in writing; that he wanted the defendant to write the plaintiff and put his position in this matter in [14] writing.

What, if any, was the connection between this letter and the telephone conversation on that same day?

A. Well, at the time of the telephone conversation we were acting as debtors in possession dealing with the Federal Court, and I wanted something in writing from Mr. Willman on the position he was taking so that when I talked to the Court I could explain to them and show them where there would evidently be some litigation.

Mr. Tassock: I offer that in evidence.

Mr. Reynolds: We have no objection, your Honor.

(The letter referred to, dated January 5, 1954, was received in evidence as Plaintiffs' Exhibit 6.)

Mr. Tassock: It has been stipulated that on January 11th, 1954, the plaintiffs received in the mail at Watseka, Illinois, the defendant's Purchase Order No. 1856, which has been marked here as Plaintiffs' Exhibit No. 8. This is a purchase order where the defendant ordered two cars of popcorn at the price of what amounts to $8.00 in Watseka, Illinois, and says not to ship him any corn under any other conditions. I offer this into evidence.

(Testimony of Harold M. Alver.)

Mr. Reynolds: You mentioned No. 8, Mr. Tassock. I think that should be No. 7, shouldn't it?

Mr. Tassock: These exhibits have so many numbers on [15] them from prior trials. It should be Plaintiff's Exhibit No. 7.

Mr. Reynolds: We have no objection, your Honor.

(The purchase order above referred to, dated January 5, 1954, was received in evidence as Plaintiffs' Exhibit 7.)

Mr. Tassock: It is stipulated that prior to January 28, 1954, the plaintiffs retained an attorney here in Portland by the name of Malcolm Clark to represent them, and that on January 28, 1954, the plaintiffs' attorney wrote the defendant a letter which is marked as Plaintiffs' Exhibit No. 8, and it was sent to the defendant, who received it in due course of mail. In this letter the attorney notified the defendant that the plaintiff is going to insist that he perform the contract; that is, that the defendant perform the contract to buy the $9.00 corn, and advised him that the purchase order which has been marked as Plaintiffs' Exhibit 7 is not acceptable under the contract and is not acceptable as an order under the contract.

We would like to offer this letter into evidence.

Mr. Reynolds: We have no objection.

(The letter referred to, dated January 28, 1954, was received in evidence as Plaintiffs' Exhibit 8.)

(Testimony of Harold M. Alver.)

Mr. Tassock: It is stipulated also that on January 28, [16] 1954, the plaintiff wrote the defendant a letter which is marked here as Plaintiffs' Exhibit No. 9, where the plaintiff informed the defendant that Mr. Clark was representing him.

I will offer that letter into evidence.

Mr. Reynolds: We have no objection, your Honor.

> (Copy of letter referred to, dated January 28, 1954, was received in evidence as Plaintiffs' Exhibit 9.)

Mr. Tassock: Now, we come to February 2nd, 1954, and we have stipulated that on that date the defendant signed and mailed to the plaintiff another purchase order which has been marked as Plaintiffs' Exhibit No. 11. This purchase order, once again, is an order for popcorn at the $8.00 price.

Mr. Reynolds: We have no objection to that, your Honor.

> (Photostatic copy of the purchase order referred to, dated February 2, 1954, was received in evidence as Plaintiffs' Exhibit 11.)

Q. (By Mr. Tassock): Mr. Alver, we have introduced into evidence here two purchase orders. Did you receive any other purchase orders from the defendant pertaining to this contract of May 11th, 1953? A. No; I did not. [17]

Q. You never received any other orders to this present day under that contract?

A. That is right.

(Testimony of Harold M. Alver.)

Q. Did you ship any popcorn in response to these orders? A. No; I didn't.

Q. One matter I would like to go back to. In your letter of December 22nd, which has been marked here—I forget the number—anyway, in one of these letters you stated, "We hold for you at our plant and to your account 1800 bags of Golden Rocket popcorn guaranteed to pop 30 to 1 or better." You say that in a letter to Mr. Willman. Would you explain to the jury and to the Court what you meant by that. That is, what do you actually do in your plant?

A. We kept our corn on the cob and on the shelled basis ready to bag out as we received orders. The corn would be on a shelled basis in bins ready to bag out, and we had marked our records showing that Mr. Willman was in arrears three cars of corn or 1800 bags at that time.

Q. In other words, you just marked it on your records? A. Yes.

Q. But there was no segregation of any corn that was actually set aside, where you said "This is Mr. Willman's popcorn"? A. No.

(Short recess.) [18]

Q. (By Mr. Tassock): Mr. Alver, what is your background and experience pertaining to the market value of popcorn in Watseka, Illinois, during the years 1953 and '54?

Mr. Reynolds: If it please the Court, we will

(Testimony of Harold M. Alver.)

stipulate that he is an expert and qualified to testify as to the market price at the times concerned.

Mr. Tassock: Very well.

Q. Did you make an investigation to determine the market value of popcorn of the kind and quality described in the contract of May 11th, 1953?

A. Yes; I did.

Q. At Watseka, Illinois, during the years '53 and '54?

A. Yes; I did. I checked my records and I checked with other brokers and the larger buyers in the country as to the market price during that time.

Q. Have you formed an opinion with respect to the market value of this popcorn in 1953 and 1954?

A. Yes; I have.

Mr. Tassock: I wonder, if the Court please, if we would be permitted at this time to write these figures down on the blackboard?

The Court: All right, if you want to. It is usually not necessary, but you may.

Mr. Tassock: In the course of the later testimony it may be helpful. [19]

Q. Mr. Alver, would you state, then, what in your opinion was the market value of popcorn of the kind and quality described in Plaintiffs' Exhibit No. 1, the contract involved here, in lots of 600 100-pound bags, or carload lots, in other words, starting in October of 1953 through, we will say, September 1, 1954; that is, from October to September what the market price was.

A. October, $8.00 per bag f.o.b. Watseka.

(Testimony of Harold M. Alver.)

Q. That is f.o.b. Watseka? A. Yes.

Q. That was the way the contract was written. What does that mean, f.o.b.?

A. That is loaded on a common carrier at Watseka, Illinois.

Q. And the buyer pays the freight from that point?

A. The customer pays the freight. November, $8.00; December, $7.00; January, $6.50; February, $6.00; March $6.00; April, $5.50; May, $5.50; June, $5.00; July, 5.00; August, 7.00; and September, $7.00.

Q. Are those prices right down to the last penny during each month?

A. No; there could be a variation of 25 cents up or down, depending upon the quantity as well as different parts of the country there might be a slight variation.

Q. But that is within a quarter of a dollar one way or the other during the month as the average price? [20] A. Yes.

Q. Is that price that you have given for carload lots?

A. Yes; full carload and full truckload lots.

Q. Is 600 bags of 100 pounds each a carload lot?

A. Yes; that is considered a carload.

Q. Are you personally familiar with the quality of the 1953 crop that you received from the farmers?

A. Yes; I am.

Q. Were the plaintiffs ready, willing and able

(Testimony of Harold M. Alver.)

from October 1, 1953, to September 1, 1954, to deliver to the defendant at Watseka, Illinois, in such installments of 600 100-pound bags as the defendant might request from time to time during such period 3600 100-pound bags of Golden Rocket popcorn, South American Yellow Hybrid variety, warranted to pop 30 to 1 on the official volume tester, at a price of $9.00 per hundred-pound bag, including the bag, f.o.b. Watseka, Illinois?

A. Yes; we were. In fact, we had far in excess of that amount of corn.

Q. Let me ask you this: If the defendant had ordered corn at any time during that period from October 1, 1953, we will say up until September of 1954, would you or would the plaintiffs have had any expenses in addition to the expenses that you had actually incurred during that period?

A. No; there would be no additional expenses.

Q. Now, did the plaintiff, Premier Popcorn here, or did you [21] during that period from October 1, 1953, to, say, September of 1954, sell any carload lots of popcorn of the kind and quality stated in the contract at a price in excess of the market prices as stated in your testimony prevailing at the time of such sales? A. No; we did not.

Q. You stated in your answer to a previous question that the 1953 crop amounted to approximately 20,000,000 pounds of shelled popcorn. How much of this corn of the 1953 crop did you have on hand, would you say, in July of 1955? How much did you still have left? A. About 7,000,000 pounds.

(Testimony of Harold M. Alver.)

Q. You still had 7,000,000 pounds of it. What happened to that '53 crop, if you know?

A. It was sold in bulk to five or six other buyers.

Q. About when did that take place?

A. September of 1955.

Q. What price did you get for that?

A. $4.50.

Q. $4.50 per 100 pounds?

A. Per 100 pounds; yes. that was without a bag. It would have been $4.75 with a bag.

Q. Then if the defendant here had ordered the corn, there would have been 3600 pounds of popcorn that you eventually sold for $4.75 that you would have sold for $9.00? A. Yes. [22]

Mr. Tassock: I have no further questions, your Honor.

Cross-Examination

By Mr. Reynolds:

Q. Mr. Alver, you stated in your testimony that there was reference to the open market on corn at the time that you were discussing with Mr. Willman the possible reduction from $9.00 to $8.00. Did you mean to say that you actually used the words to Mr. Willman "open market corn"? A. Yes.

Q. I believe in your testimony you stated that in the letter of October 23rd, 1953, which is Plaintiffs' Exhibit No. 3, you referred to open market corn. Did you so testify?

A. Yes. Market corn; yes.

(Testimony of Harold M. Alver.)

Mr. Reynolds: I wonder if we could have Exhibit 3 a minute? Will you hand it to Mr. Alver?

Q. Does it say anything actually in that letter about open market corn?

A. Do you want me to read it?

Q. Yes; maybe that would be best.

A. "As to the contract dated May 11, 1953, we will hold this contract in abeyance and ship you popcorn for the time being at a price of $8.00 a hundredweight, including the bag, f.o.b. our [23] plant."

Q. That is fine. You testified with reference to the conversation in Mr. Willman's office in Portland in November of 1953, when I believe you came out to check on some other car of corn. Who was present during the time that you were discussing the price on this May contract?

A. Mr. Willman and myself.

Q. Do you recall whether Noel Bennett, our salesman, was there?

A. He was in the building. He wasn't in the office that I was sitting in with Mr. Willman.

Q. Would you say that he was not ever there in your presence? A. Yes.

Q. You also testified that during that conversation you talked about insisting that Mr. Willman order out the 3,600 bags on your May contract. Now at that time the May contract was actually for 7,200 bags, wasn't it? A. Yes.

Q. Did you tell him that you expected him to order out the 7,200 bags?

A. No. I told him that we expected him to live

(Testimony of Harold M. Alver.)

up to that contract. However, we would hold up delivery on that contract for the time being if he wished to purchase some $8.00 market price corn from us, which he had, I assumed, agreed to do. I was asking him for shipping instructions on some popcorn, [24] either $9.00 contract corn or $8.00 market price corn.

Q. Now, as to the length of time that you would hold up the May 11th contract, was there any specific time ever set, Mr. Alver?

A. No specific time was set. We had in mind January 1st, holding it up for three months. That had been mentioned. However, no time had been set for the holding up of the $9.00 contract.

Q. That January 1st time was not mentioned to Mr. Willman, though?

A. In our conversations it had been mentioned, I believe.

Q. Isn't it a fact that you were actually prepared to hold up that contract almost indefinitely?

A. If the occasion had arose, I imagine we would have held it longer than that had Mr. Willman purchased his monthly requirements at the market price.

Q. You mean at the market price or at the $8.00 price? A. At the $8.00 price.

Q. Now, the first notice that you gave to Mr. Willman that you no longer would hold the contract in abeyance was your letter of December 22nd, which is Plaintiffs' Exhibit No. 5. Is that correct?

A. Yes, it is.

(Testimony of Harold M. Alver.)

Q. And to that you attached an invoice for two cars of corn? A. Yes. [25]

Q. Or for three cars. Maybe you better look at that, if you will, Exhibit No. 5.

A. For the three cars, the October, November and December shipments.

Q. At the $9.00 price? A. Yes.

Q. When you received these purchase orders from Mr. Willman for $8.00 corn you could have shipped it at $8.00 if you had so desired; is that correct? A. Yes, we had the corn.

Q. Did you ever discuss with Mr. Willman the possibility of shipping under those purchase orders at $8.00 and leaving open for further settlement the difference between the $8.00 and the $9.00?

A. No.

Q. Now, after the popcorn convention in Chicago, did you talk to your partners about this possible change in price that Mr. Willman asked about?

A. Yes.

Q. And did you, as a partnership, come to any agreement on that question? A. Yes.

Q. Did your letter of October 23rd embody that agreement that you arrived at?

A. Yes. [26]

Mr. Reynolds: I believe that is all the questions I have, your Honor.

(Testimony of Harold M. Alver.)

Redirect Examination

By Mr. Tassock:

Q. Mr. Alver, just one question here: You were asked if you had ever discussed with Mr. Willman the possibility of shipping the $8.00 corn and leaving the additional question of $1.00 open for further negotiations. I would ask the Clerk to hand you the two purchase orders, and I would like you to read those, particularly the language which says, "Ship under no other conditions."

A. To Premier Popcorn Company from Poppers Supply Company of Portland, "Ship one 600-bag car of popcorn from sales contract dating May 11, 1953, to arrive in Portland the last week of January, 1954. This car of corn to have as good a popping volume as the last two cars received from your company. The price of this corn to be $9.50 f.o.b. Portland as you quoted last November. Ship another 600-bag car to arrive in Portland approximately March 25, 1954, with the same above specifications. If sight draft bill of lading is used, be sure to specify 'inspection allowed.' Do not ship under any other terms." Signed, "Herman Willman."

Q. Let me ask you this question: What is the freight rate between Watseka and Portland? [27]

A. A dollar and a half.

Q. So that $9.50——

A. $9.50 delivered Portland was the equivalent

(Testimony of Harold M. Alver.)

of $8.00 f.o.b. Watseka. The second purchase order, dated February 2nd, to Premier Popcorn Company from Poppers Supply Company: "Because you have not shipped the corn ordered by Purchase Order No. 1856, dated January 5, 1954, we must cancel that order and issue the following revised purchase order, with shipping instructions for all six cars of popcorn, all in accordance with the contract dated May 11, 1953, as amended May 20 and October 23, 1953. This corn is to have as good popping volume as the last two cars received from your company. The price of this corn is to be $8.00 f.o.b. Watseka, Illinois. If sight draft bill of lading is used, be sure to specify 'inspection allowed.' Do not ship under any other terms.

"Ship one 600-bag car of popcorn on February 6, 1954; ship one 600-bag car of popcorn on March 25, 1954; ship one 600-bag car of popcorn on May 3, 1954; ship one 600-bag car of popcorn on June 20, 1954; ship one 600-bag car of popcorn on July 30, 1954; ship one 600-bag car of popcorn on September 2, 1954.

"Confirm order by return air mail. Poppers Supply Company, Herman Willman."

Q. Those two purchase orders didn't leave any room for [28] discussion, did they? A. No.

Q. You testified that Mr. Willman had told you in a telephone conversation on January 5th—do you remember the exact words that he told you?

A. He said we could keep our God-damned pop-

(Testimony of Harold M. Alver.)

corn and sue him and he would drag it through the courts for three years.

Q. You remember those words exactly, do you?

A. I do.

Q. How do you happen to remember that?

A. Well, we had just finished prior to October delivering Mr. Willman 7,200 bags of corn. He had paid us a price of $9.00 during the year 1952. At that time the market price was $12.50, and we delivered to him every pound of that corn. He was buying it at $3.50 under the market price, and we saved him approximately $25,000 in the previous year. And now the minute the market dropped——

Mr. Reynolds: Your Honor, just a minute——

The Court: He may continue. He may tell his story.

The Witness: Now that the market dropped a dollar under $9.00 he refused to take the corn.

Q. (By Mr. Tassock): You were not inclined to discuss, then, letting this $1.00 await further negotiations? A. No.

Mr. Tassock: That is all.

(Witness excused.) [29]

Mr. Tassock: That is the plaintiffs' case, your Honor.

(Plaintiffs rest.)

HERMAN P. WILLMAN

the Defendant herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Reynolds:

Q. Mr. Willman, you are the defendant in this case; is that correct? A. That is correct.

Q. What is your business?

A. I operate Poppers Supply Company, which is a wholesale firm dealing in all concession items.

Q. Now, you have just heard Mr. Alver testify with reference to a telephone conversation that you had with him on January 5th of 1954. He said that you told him to keep his "damned corn" or his "God-damned corn." Did you say that to him?

A. I did not.

Q. Did you tell him that you would drag him through the courts for two or three years?

A. I did not. [30]

Q. Will you tell the jury a little bit about how your business operates?

A. Yes. My business operates in this manner: We carry all types of equipment and supplies for the concession people, such as the theaters, the ball parks, and so on and so forth. We carry popcorn, boxes, oils, syrups and every type, practically, of equipment and supplies for the various concession operators.

Q. Where do you get your popcorn?

(Testimony of Herman P. Willman.)

A. Most of the popcorn comes out of the Middlewest.

Q. How long have you known Mr. Alver here?

A. I think I have known Mr. Alver, probably, five or six years now.

Q. How did you come to know him?

A. As a popcorn processor.

Q. Had you purchased corn from him in the past?

A. Yes, I have purchased corn from Mr. Alver.

Q. At the time that you executed this contract of May 11th, 1953, which is Plaintiffs' Exhibit No. 1, did you have any particular conversation with Mr. Alver about the price?

A. Yes. We were talking about price. Mostly about quality.

Q. What did either of you say about quality?

A. He said that their company had a special new seed, which I knew did exist, and he was saying that anyone who would sign a contract with them would get the corn from this special seed [31] which was to pop at 37 or 38 to 1, which is a volume 5 to 6 points higher than any other corn, normal corn.

Mr. Tassock: If the Court please, there is no allegation here that the contract does not state the agreement of the parties with respect to the quality of the corn.

The Court: We will see what the next question is.

(Testimony of Herman P. Willman.)

Q. (By Mr. Reynolds): When did you next talk to Mr. Alver about this contract?

A. Well, I called Mr. Alver several times during the summer period when we would be ordering out a car of corn from a previous contract. Oftentimes we talked about the corn that he was raising that summer. Perhaps the largest conversation took place in Chicago at the popcorn convention on October 12th, 13th and 14th. I believe those were the dates.

Q. During that conversation, was the contract price mentioned by either of you? A. Yes.

Q. Will you tell the jury just what you said and what Mr. Alver said, if anything.

A. Yes. During the popcorn convention in Chicago I talked to Mr. Alver, I think perhaps every day, and perhaps four or five times each day, and I told Mr. Alver the market was going down considerably and I asked him if he would consider giving us some relief on this contract price. Mr. Alver [32] stated that he would go back and talk to his partners and let me know.

Q. Did you mention any specific figure?

A. At that time there was no specific figure mentioned.

Q. When was the next time you had any communication with Mr. Alver?

A. On October 23rd Mr. Alver called me and he says, "Mr. Willman, I have talked it over with my partners and," he says, "we will"—he asked me if this would be satisfactory to me: He says, "We will

(Testimony of Herman P. Willman.)
reduce the price on the one 800-bag car that we had coming from a previous contract''—that they would reduce the price from $12.50 f.o.b. Portland to $10.50 f.o.b. Portland. And he said on the May 11th contract that, for the time being, they would lower the price from $9.00 to $8.00 f.o.b. Watseka, with this provision: That if the market price went back up to $9.00 they would want then to go back to the $9.00 price. He asked me if that was agreeable and I said it was. I asked him to give me a letter in writing to that effect.

Q. Did you receive such a letter?

A. I did.

Mr. Reynolds: I wonder if the Clerk would hand the witness Exhibit No. 3.

The Court: We will recess now until 1:30. Ladies and Gentlemen, don't discuss the case or permit it to be discussed [33] in your presence until it is finally submitted to you.

(Thereupon, a recess was taken until 1:30 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows.)

H. P. WILLMAN

resumed the stand and was further examined and testified as follows:

Direct Examination
(Continued)

By Mr. Reynolds:

Q. You have been handed Exhibit No. 3. That is the letter referring to hold the contract in abeyance, I believe, Mr. Willman?

A. That is correct.

Q. You did receive that letter? A. I did.

Q. Now, either in that letter or in prior conversations did you ever talk to Mr. Alver about shipping open market corn?

A. No, that had never been mentioned up to this time.

Q. After receiving that letter when is the next time that you had contact with Mr. Alver?

A. On November 5th Mr. Alver shipped us the last car of corn from the previous contract, and part of that car of corn [34] was defective in certain respects. I called Mr. Alver on November 5th and told him that this car of corn contained other types of corn in it. Mr. Alver didn't believe me, and he said, "Let the corn sit on the track until I can fly out and examine the corn myself." On November 9th Mr. Alver arrived in Portland to examine the car of corn.

Q. During that visit did you have any conversation with him concerning the contract price under this May 11th contract?

(Testimony of Herman P. Willman.)

A. Yes. We talked about the amount of corn that was grown in 1953, and again we talked about changing the contract, and right along this same line the same thing was said once more, that he would change the price on the contract from $9.00 to $8.00, but again he specified this one point, that in the event the market price of corn went up he would want to go back to the $9.00 price. And I told him that was very agreeable.

Q. In that conversation was there any mention of the January 1st date to return to the contract price? A. None whatsoever.

Q. Was there any mention of when any of the corn under the May 11th contract should be shipped?

A. It was not discussed at that time, because on November 6th we had just unloaded the last car of the previous contract. Mr. Alver and I both knew that it takes 30 to 45 days to get [35] rid of a car of corn, which would put us into the first of January before we would be able to order out any more corn.

Q. Who was present during those conversations?

A. When Mr. Alver was in my office on November 9th Mr. Bennett, my salesman, was with us part of the time. The office girl was very close to the office where we were conversing. However, she says she didn't hear any of the conversations. Mr. Bennett was in the office with us when we were talking about the popcorn yield, the crop and the price.

(Testimony of Herman P. Willman.)

Q. Was he there during the time you were talking about the price on this May 11th contract?

A. He was.

Q. That is the gentleman sitting here on my right? A. That is correct.

Q. Did you at that time talk to Mr. Alver concerning that Exhibit No. 3 you have in your hand?

A. I don't think we talked about this letter, no.

Q. Have you ever up to this time and including this time ever discussed with him the meaning of the word "abeyance" as used in that letter?

A. That word was never uttered, I don't believe, by either party.

Q. When was the next time you had contact with Mr. Alver [36] concerning this contract?

A. On December 15th I wrote to Mr. Alver that we were canceling the last six cars of corn as per his previous agreement of May 20th.

Q. Then next after that when did you have contact with him?

A. I think the next thing that came along was Mr. Alver's invoices and his letter of January 5th.

Mr. Reynolds: I wonder if the Clerk would hand the witness Exhibit No. 5.

Q. Is that exhibit the one you have just referred to? A. Yes, that is correct.

Q. That is dated December 22nd, 1953, I believe.

A. That letter was received in Portland on January 5th.

Q. And that letter has attached to it an invoice, I believe. A. It does.

(Testimony of Herman P. Willman.)

Q. When you received that, what did you do?

A. When I received this invoice—it calls for 1800 bags of Golden Rocket popcorn at $9.00. Now previous to this invoice every bit of corn shipped from Premier Popcorn Company to Poppers Supply Company had always been freight prepaid. When I looked at this invoice and it said a $9.00 price I wondered about it, if Mr. Alver was cutting the corn an additional 50 cents a bag. I wondered about it long enough [37] until I called Mr. Alver that same day to see why that $9.00 price was on those invoices.

Q. Now what was said by both of you in that telephone conversation?

A. I called Mr. Alver and I asked him if he was further reducing the price of the corn 50 cents a bag. Mr. Alver says he was not. He said he was going back to the original contract price. I asked Mr. Alver why he was going back to the $9.00 price rather than the $8.00 price, and all Mr. Alver would say was that he was simply going back to the $9.00 price.

Q. Was there anything said in that conversation concerning shipping instructions under the contract?

A. Mr. Alver did ask us to explain our position to him, and we did put it in writing by sending through a purchase order for two cars of corn at that very same date.

Q. Did you have any further contacts with Mr. Alver concerning this contract?

A. I think the next letter we received from Mr. Alver was that his company was in financial difficul-

(Testimony of Herman P. Willman.)

ties and was operating under the jurisdiction of the Federal Court.

Mr. Reynolds: I wonder if you would hand the witness Exhibit No. 13.

Q. Is that the letter to which you just referred?

A. That is. [38]

Q. It is dated December 15th or December 16th, 1953?

A. Evidently this came in previous to the January 5th telephone call.

Mr. Reynolds: I think there are about three exhibits in Mrs. Mundorff's possession that have not been introduced. I wonder if I could have those.

I am offering in evidence, your Honor, Exhibit No. 12, which is a telegram from Mr. Willman to Premier Popcorn, the plaintiff. Is that all right?

Mr. Tassock: Yes.

The Court: Admitted.

(Photostatic copy of telegram above referred to, dated February 11, 1954, was received in evidence as Defendant's Exhibit 12.)

Mr. Reynolds: Would you be good enough to hand that to the witness?

Q. That is a telegram from you to Mr. Alver's firm, is it not? A. That is correct.

Q. What is the nature of that? It is short. You might just read it.

A. "We are completely out of corn and must know today by return wire if you are shipping corn

(Testimony of Herman P. Willman.)

from our Purchase Order 1867 dated February 2, 1954. Poppers Supply Company."

Q. Did you receive any reply to that wire? [39]

A. None whatsoever.

Q. Did you have any further conversations with Mr. Alver concerning this contract?

A. There was a previous telephone call to Alver's firm shortly after we sent the first purchase order. I called him to find out if they were shipping corn, and I talked to Mrs. Alver. Mr. Alver was out. And she said she would have Mr. Alver contact me and let me know when they were shipping the corn. And I never heard anything from that purchase order either. This wire is in regard to the second purchase order.

Q. The second purchase order being for six cars?

A. That is right.

Q. Now were you at all times willing and able to order out and accept corn under this contract at $8.00? A. Yes.

Q. But none was ever shipped; is that correct?

A. None was ever shipped.

Q. Exhibit No. 11 covers six cars of corn, does it not? A. That is correct.

Q. Is that the purchase order you were just referring to when you were talking about the telegram? A. That is correct.

Mr. Reynolds: If it please the Court, we would also like to offer in evidence Exhibit No. 10. This is a letter [40] from Mr. Stirling to Mr. Clark. I will offer this in evidence.

(Testimony of Herman P. Willman.)

Mr. Tassock: No objection.

The Court: Admitted.

(Photostatic copy of letter referred to, dated February 2, 1954, was received in evidence as Defendant's Exhibit 10.)

Mr. Reynolds: I think that is all we have now. We may have some redirect, your Honor.

Cross-Examination

By Mr. Tassock:

Q. Mr. Willman, you have been referring to two purchase orders that were sent ordering corn out at $8.00. A. Yes.

Q. I want to ask you did you know at that time of sending both of those purchase orders that the plaintiff here was insisting on a $9.00 price?

A. Well, yes.

Q. That question can be answered Yes or No.

A. Yes.

Q. If I understand your testimony correctly, you indicated that there was an agreement that the contract price was to be reduced from $9.00 to $8.00. Now I want to ask you this question: Did you give the plaintiff any cash or monetary consideration for that reduction? That can be answered Yes [41] or No. A. No.

Q. Did you promise to do anything for that reduction? A. No.

Q. Did you give the plaintiff anything for that reduction? A. No.

Mr. Tassock: No further questions, your Honor.

(Testimony of Herman P. Willman.)

Redirect Examination

By Mr. Reynolds:

Q. When you answered that you didn't promise to do anything, was there any agreement that you were going to accept any corn at $8.00?

A. We would take the six cars of corn at $8.00.

Q. At that time how long had you been buying corn from Mr. Alver? A. Perhaps two years.

Q. Did Mr. Alver ask you to give anything other than agreeing to take the six cars of corn when this $8.00 price was discussed? A. He did not.

Q. Did he say anything about the price going back up, or in the event the market price went up?

A. In the event the market price went back up we were going to go back to the $9.00 price. [42]

Q. And did he agree to ship you corn under that contract at $8.00? A. He did.

Mr. Reynolds: Mr. Tassock, will you require me to qualify him as an expert on market price?

Mr. Tassock: No, that is all right.

Q. (By Mr. Reynolds:) Do you know, Mr. Willman, the market price of popcorn of the type, variety and quantity covered by this contract at Watseka, Illinois, during the month of October, 1953, and through September of 1954?

A. I have made a very careful study of those prices, and also contacted perhaps the largest processor in the entire industry and asked them for their prices for those months.

(Testimony of Herman P. Willman.)

Q. Do you know presently what those prices were? A. Yes.

Q. I wonder if I might list them. October of 1953?

A. October it still was $9.00. November was $8.00; December was $7.00; January was $7.25; February was $6.75; March was $6.00. Through the summer it stayed practically at $6.00 until August, when the market started to firm up.

Q. That would be April, $6.00; May, $6.00; June, $6.00; and July, $6.00. Now would you say in August it was still $6.00?

A. In August the market started to rise. It went up to about $6.50 to $6.75 in August. [43]

Q. Do you have the figure for September?

A. September would run $7.00.

Mr. Reynolds: I would like your permission, Mr. Tassock, to write "Alver" over this column. That is yours.

Mr. Tassock: All right.

Mr. Reynolds: And "Willman" over the other one.

(Mr. Reynolds identified the two columns on the blackboard as indicated.)

Q. (By Mr. Reynolds): Mr. Willman, we have been talking about $8.00 and $9.00. The contract, Exhibit No. 1, I think actually says $8.75. What is the reason for that difference?

A. The reason is that Mr. Alver has given his customers the opportunity of furnishing their own

(Testimony of Herman P. Willman.)

bag to put the corn in. In the event that Mr. Alver furnishes the bag, then he charges 25 cents for the bag, which would bring the price up to $9.00.

Q. That price would only obtain, then, on a bag basis; it would not obtain on a bulk basis?

A. No, that price would not obtain on a bulk basis.

Q. Did Mr. Alver ever approach you with the idea of shipping corn at $8.00, leaving open the question of the difference between $8.00 and $9.00 for future negotiations? A. No.

Mr. Reynolds: That is all, your Honor. [44]

Recross-Examination

By Mr. Tassock:

Q. In the course of your deposition, Mr. Willman, you testified—this question was put to you: "What was the market price about this time, November 11th?" And your answer was: "About $8.50 f.o.b. Portland." Is there any particular reason why there is that discrepancy? You have $8.00 listed there.

A. Yes, sir. I have seen various prices from various companies. The prices I have there come from the Central Popcorn Company, which is the largest in the industry. They took every one of their entire sales for that entire period of time and averaged those out, and that is their prices. Now I have seen other sales in small amounts and in some large amounts lower and higher than those figures.

(Testimony of Herman P. Willman.)

Q. But your testimony is based upon the information which they gave you?

A. That is correct.

Mr. Tassock: I move at this time, your Honor, that his testimony be stricken as being incompetent.

The Court: Motion denied.

Q. (By Mr. Tassock): As I understand your testimony, Mr. Willman, those figures are mathematical averages. In other words, there would be sales in the particular time which would be lower than those figures that you have mentioned and there [45] would be others which would be somewhat higher than those figures?

A. That is right.

Q. This is a mathematical average?

A. It is a mathematical average over all of their entire sales for each month.

Q. Those sales, of course, would include their contract sales, would they not?

A. I wouldn't know. I presume they would. It is their entire sales.

Q. So if they had also future contracts which they had made in the spring of the year before the planting at a higher price, for example $9.00, those figures would be included in those calculations, wouldn't they?

A. For your information, the Central Popcorn Company reduced every contract they had in price.

Q. That didn't answer my question. I don't know that you are competent to give the testimony you have just given. You don't know what they did. I

(Testimony of Herman P. Willman.)

am asking you this: Do those figures include the sales that this company that you are relying on made on their future contracts?

A. It would include all of their sales.

Q. All of their sales?

A. All of their entire sales.

Q. And these figures include the bags, do they not? [46] A. They would.

Mr. Tassock: 25 cents on the bags. No further questions, your Honor.

Mr. Reynolds: That is all.

(Witness excused.) [47]

NOEL BENNETT

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Reynolds:

Q. What is your occupation, Mr. Bennett?

A. Salesman for Poppers Supply Company.

Q. How long have you been so employed?

A. A little over six years.

Q. You have heard the testimony concerning a meeting between Mr. Alver and Mr. Willman in November of 1953. Do you recall such a meeting?

A. Yes, I do.

Q. Where was it?

(Testimony of Noel Bennett.)

A. In Mr. Willman's plant office at 206 Northeast 7th at that time.

Q. Were you with Mr. Alver all of the time that he was here in Portland that time?

A. I don't know what time Mr. Alver left. I was with him the better part of an hour and a half that day.

Q. Did you hear any conversation between Mr. Alver and Mr. Willman concerning the price of corn under the contract dated May 11th, 1953?

A. Yes, I did.

Q. Where did that conversation take place? [48]

A. In Mr. Willman's private office.

Q. Will you tell the jury what Mr. Alver and what Mr. Willman said.

A. Well, in the beginning the talk was in regard to the settlement on this defective car of corn, and after that was settled, why, then they began talking about the new contract. And during that conversation Mr. Alver told Mr. Willman that he was cutting his contract price a dollar a bag and that should give us some relief.

Q. Did Mr. Willman make any statement then?

A. I don't remember the exact words. No, I don't.

Q. Did Mr. Willman say anything about whether or not he would take corn at $8.00?

A. Well, yes, he did.

Q. Did you hear mentioned at that time the word "abeyance"? A. No, sir; I didn't.

(Testimony of Noel Bennett.)

Q. Was there any mention of a different price to obtain in the future on the contract?

A. I don't remember that. I couldn't say for sure.

Q. Or was the date January 1st mentioned at that time? A. No, I don't remember that.

Mr. Reynolds: That is all. [49]

Cross-Examination

By Mr. Tassock:

Q. Do you remember, Mr. Bennett, anything that was said other than that Mr. Alver agreed to reduce the price $1.00? Do you remember anything else definitely?

A. Yes, I remember the settlement on the car of defective corn. That is, I know that they talked about that first.

Q. You were present when that was done?

A. Yes.

Q. How long have you been employed by Mr. Willman here? A. Six years.

Q. Is your salary adequate?

A. Very fine.

Q. Satisfactory. How old a man are you, Mr. Bennett? A. 39.

Q. How many dependents do you have?

A. Six.

Q. Did you have occasion to discuss this matter with Mr. Willman after Mr. Alver left?

A. Yes, you bet.

(Testimony of Noel Bennett.)

Q. What was said, as you recall?

A. We were very happy that we were going to get our corn price reduced so that we could meet competition.

Q. Mr. Willman was very happy at that time?

A. We both were. [50]

Q. Did he express this to you on several occasions afterward?

A. Well, naturally, the time that I am in the office—most of the time is spent talking about corn sales and equipment sales and conditions in the field.

Q. You say he was definitely delighted at that point because the price had been reduced?

A. Naturally.

Q. Did you leave there before their conversation had concluded?

A. I believe I did. I think I left before Mr. Alver did.

Q. He stayed there for some time?

A. I don't know how long he stayed there after I left.

Mr. Tassock: No further questions.

Mr. Reynolds: That is all.

(Witness excused.)

Mr. Reynolds: That is the defendant's case, your Honor.

Mr. Tassock: If the Court please, there is a deposition in the file, and parts of it I would like to introduce into evidence for the purpose of im-

peachment of Mr. Bennett. May I read from the copy? I only want to put in portions of it, your Honor.

Mr. Reynolds: If the Court please, I don't believe [51] there are any depositions in this case.

Mr. Tassock: The depositions in the previous case, Civil No. 7440, are admissible in this case under Rule 26-D of the Federal Rules.

The Court: I would think so.

Mr. Tassock: Sir?

The Court: I would think so.

Mr. Tassock: If the Court please, may I proceed by just reading the questions and answers?

The Court: If you want to do it that way. Any way you want to do it.

Mr. Tassock: I am reading from the deposition taken of Mr. Noel S. Bennett, taken on September 3rd, 1954, which was used in connection with another trial of this case.

The Court: Is that this gentleman?

Mr. Tassock: Yes.

The Court: Don't you have to call his attention to that while he is on the stand if you claim he has made inconsistent statements here?

Mr. Tassock: I don't know, your Honor. No, I don't think so.

The Court: Don't you have to give him a chance to admit or deny it or explain it? I think you do.

Mr. Tassock: All right.

The Court: Come back here. [52]

NOEL BENNETT

a witness produced in behalf of the Defendant, resumed the stand and was further examined and testified as follows:

Further Cross-Examination

By Mr. Tassock:

Mr. Reynolds: Pardon me. May I inquire now the status of the witness? Is he the plaintiff's witness?

The Court: He is your witness and the cross-examination is continuing. He is about to ask him some impeaching question.

Q. (By Mr. Tassock): As I recall your direct testimony, Mr. Bennett, you testified that you knew about the settlement that was made with respect to the car of corn that Mr. Alver came out to inspect, and that that was discussed at the time of your meeting there on that day with the three of you.

A. That was part of the discussion, yes.

Q. Now, in the course of your deposition——

The Court: Give the time and place.

Q. ——which was given in Portland, Oregon, on September 3rd, 1954, I asked you: "What was decided with respect to that corn that was supposed to be mixed; do you recall?" And you testified: "I am not positive what settlement Mr. Willman came to on that with him." I asked you: "Have you got any ideas?" You said: "Not for sure."

Your testimony then was that you didn't know

(Testimony of Noel Bennett.)

what [53] the settlement was, and I understood you to say a moment ago that you did; that you heard what it was. Now were you present and learned what the settlement was, or weren't you?

A. Yes, I was. I was present.

Q. Do you now recall what the settlement was?

A. I think it was 50 cents a bag on the corn.

Q. But at this time you didn't know, in 1954?

A. It probably came to my mind since that deposition.

Q. Then I asked you this question: "The only thing that you remember for sure was that Mr. Alver said he was going to cut the price of corn $1.00," and your answer was, "That is right." The next question: "That is all you remember about the conversation?" And your answer: "Well, I will tell you why I remember that definitely, because we talked about it after Mr. Alver left and we were very happy."

Now there again your testimony was that you remembered nothing else other than the conversation relating to the reduction of the contract.

A. Well, there was lots of talk that morning, crop yield, prices——

Q. All of which you remember now but didn't remember then? A. It is possible.

Mr. Tassock: No further questions, your Honor.

Mr. Reynolds: That is all.

(Witness excused.) [54]

The Court: They have rested.

Mr. Tassock: I would like to call Mr. Alver for one question.

HAROLD M. ALVER

the Plaintiff herein, was recalled as a witness, in Rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tassock:

Q. Mr. Alver, in connection with Plaintiffs' Exhibit 3, the letter of October 23rd, which reads as follows:

> "Confirming our telephone conversation today, we will ship next week the balance of your contract dated December 31, 1952, 800 bags, at a price of $10.50 f.o.b. Portland instead of the price of $12.50 as stated in the contract."

Now in that instance you made a definite reduction of this 1952 contract. Could you explain what would be the difference between the '52 situation and the contract of May 11th with which we are dealing in 1953.

A. Mr. Willman refused to take that car of corn at $12.50. He wanted a reduction. And we were then in the new crop of 1953, and that corn had not cost us as much or didn't cost us [55] as much as the corn that we had previously applied or held for that sale. So, since he refused to take it at $12.50, we reduced it to $10.50 delivered Portland. Then after he got the car of corn he complained that there was some white corn——

(Testimony of Harold M. Alver.)

Q. Answer the question. I just wanted to know—if I understand you, your 1952 contract was based upon corn that you had purchased in 1952 from the farmers? A. Yes?

Q. But by the time this delivery rolled around you had begun to receive your 1953 corn which had been purchased at a lower price from the farmers?

A. Yes.

Mr. Tassock: No further questions, your Honor.

Cross-Examination

By Mr. Reynolds:

Q. Mr. Alver, did you say that Mr. Willman refused to take that car of corn you were just talking about? A. At $12.50, yes.

Q. How did he make known to you his refusal?

A. In a telephone conversation.

Q. Do you recall when that was?

A. October 23rd. It was at the time I wrote that letter reducing the price to him. [56]

Q. Do I understand that you had a lot of extra corn on hand at that time, and that is why you were willing to make this deal on this particular car?

A. The corn I had on hand had cost me less than the previous corn had, so I could make that reduction to him.

Q. You had corn on hand and no place to put it?

A. Yes.

Q. Is that correct?

A. That is right. He had refused to take it at

(Testimony of Harold M. Alver.)
$12.50, so I did the next best thing and sold it to him at $10.50.

Q. Now with reference to the 1953 crop, you had a big surplus of that, too, did you not?

A. Yes.

Mr. Reynolds: That is all.

Redirect Examination

By Mr. Tassock:

Q. That is what you are talking about, is the 1953 crop, isn't it, Mr. Alver? A. Yes.

Q. That you had on hand which had been purchased on '53 prices? A. That is right.

Mr. Tassock: Thank you.

(Witness excused.) [57]

Mr. Tassock: That is all, your Honor.

Mr. Reynolds: We have nothing further, your Honor.

(Whereupon, the jury was excused until 9:30 a.m., Wednesday, December 5, 1956, and after the jury had retired from the courtroom the following proceedings occurred out of the presence and hearing of the jury.)

Mr. Tassock: Just for the record I will make a motion which is similar to the instructions that we requested.

I move the Court to instruct the jury that the defendant has not established a defense that the contract was modified by subsequent agreement as

to price on the ground that such an agreement would be in violation of the statute of frauds and that there was no considerations supporting any such agreement and, therefore, as a matter of law the defendant has not established that defense.

The Court: That would amount to a directed verdict for the plaintiff.

Mr. Tassock: Except on the question of damages, yes.

(Further discussion between Court and counsel.) [58]

December 5, 1956, at 9:30 o'Clock A.M.

(Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows:)

The Court: One of our jurors has become ill, so I will have to ask you what I am sure you will be willing to agree to; that is, a stipulation that we may proceed with eleven jurors.

Mr. Tassock: The plaintiff will so stipulate, your Honor.

The Court: Is that satisfactory to you gentlemen?

Mr. Reynolds: May it please the Court, there is one matter that I would like to submit, that I suppose should be presented in the absence of the jury.

The Court: Are you willing to go ahead with the eleven jurors?

Mr. Reynolds: On that point we would like to

have some indication of the Court's instructions that you intend to give.

The Court: I am not going to have you impose conditions. You may be sure I will find a way to go ahead with 11 jurors whether you stipulate or not.

Mr. Reynolds: No, we will go ahead with 11 jurors. That is all right, but we have this other motion.

The Court: Take the jury over to the other room. [59]

(Whereupon, the jury was excused from the courtroom and the following occurred out of the presence and hearing of the jury.)

Mr. Reynolds: That this time, your Honor, the defendant moves for a dismissal of this case on the basis that the contract itself provides certain remedies available to the seller in event of a breach. Those remedies are set forth in the contract.

It is this paragraph: "Buyer shall furnish seller complete shipping instructions at least ten days before the stated shipping time for each installment. If buyer fails to give seller shipping instructions as required herein then at the expiration of the stated shipping time seller may at seller's option and without notice (a) hold the goods and invoice the buyer for the same or (b) extend the time of shipment or (c) be excused from delivering the balance of the goods or continuing the performance of the contract."

Our position is that they are limited to the rights

granted them under the contract, and in this case they do not proceed on any of those bases.

Mr. Tassock: If the Court please, I don't believe the paragraph referred to is intended to impose an exclusive remedy. For one thing, the language is that the seller "may." It doesn't say he must exercise one of these options. It says [60] he may exercise any of these options. Our position is it just is not an exclusive remedy, nor could not be.

The Court: Didn't he do "(a)"? Didn't he hold the goods and invoice them?

Mr. Tassock: He did that, yes, for a period, your Honor.

The Court: Didn't he do it at the end?

Mr. Tassock: No, because, as he testified, he couldn't. But he always had enough goods to perform.

The Court: Didn't he at the end of what you call the anticipatory breach period invoice the whole works?

Mr. Tassock: No, not the whole works. But he did up to that point have the goods, and he had the goods all the way through to ship, as a matter of fact, and he did invoice all but the last month. But the evidence here would only show invoices for the first three months. There is no additional evidence as to invoicing.

The Court: This case has had a hectic career. I don't imagine what I am going to say is going to be satisfactory. I know it isn't all around. It isn't the kind of case that I enjoy, because the result,

it seems to me, that is impelled by the record is really not equitable. But the law of sales in the commercial world has never really been equitable.

After reflection overnight, taking these papers home with me and reading them both last night and this morning, [61] I don't see anything much to submit to this jury. I can't follow you gentlemen on your claim that there is a rescission, a question of rescission to be submitted to the jury. That is not your testimony. It may be your theory, but it it is not your testimony. Your testimony is that the contract was modified, not rescinded. Your client's two orders there at the end, when he was taking his position—and these people, no doubt under a lawyer's advice at the time, were squaring off to take the position—the last two orders are definitely related to the contract, and they purport to be under the contract of May, 1953. So very clearly it seems to me that what you were saying at that time was that you recognized that the contract was still in existence but it had been modified as to price and you were ordering under the contract but at the lower price.

That is where you get into legal difficulties, it seems to me, because you have to rely upon an oral modification of the contract except as you claim something for that letter with the word "abeyance" in it. That is the only writing that you can claim supports your modification theory. I just don't read that letter the way you claim for it.

So in my view of the case the plaintiff is entitled to a directed verdict, with only one question for the

jury and that is the amount of damages, to whatever extent you differ there. [62]

What is the month that you compute your damages on? February?

Mr. Tassock: I took February or January. I think that would be a question for the jury as to what month, your Honor.

The Court: You have two different prices there in both those months. If you want to argue that question to the jury, I will come back and we can do that. Or it may be that you can agree on a figure between you without waiving your rights. I will come back again in fifteen minutes.

(Whereupon, a short recess was taken, and thereafter the matter was argued to the jury by counsel for the respective parties, and the Court then instructed the jury as follows:)

The Court: Ladies and Gentlemen, the plaintiffs' theory about the damage here is that in the month of January the parties came to the end of this tranaction in the sense that at that time—that is one possibility, according to the plaintiffs' way of looking at it—the buyer, the man down here at the end of the table, made it definitely plain that he was not going to go ahead with the deal, so that the damages should be calculated as of that time and the damages would be the difference between the contract price which was $9.00 per 100 pounds and what the then market price was. The parties differ as to what the market price was. The plaintiff says [63] it was then $6.50; that it had fallen to

$6.50 per hundred pounds, whereas, as you see over there, the defendant says it had not fallen that much at that time; that it had only fallen to $7.25. So if that is the method in which the damages should be figured, the damages would come out differently on account of the difference between the parties as to what the then market was.

Those are the first two figures that I suggest you write down. If you take the $6.50 market figure, which is the plaintiff's idea, as of that month the damages would be $9,000, if that is the method to use, whereas if you take the defendant's idea of the market, which is a good deal higher, or $7.25, the damages would be less. They would be $6,300.

That is one of the things you may have to resolve in the case. Now, then, if February is the month to take, if that is the month when in fact the parties came to the end of their transaction, by a definite rejection by the buyer of the contract, you have two figures again to deal with because of the difference between the parties as to what the market price then was. As you see on the board, the plaintiffs' idea was that the market had fallen to $6.00, or $3.00 less than the contract price. And since the amount in dispute was 3,600 bags, that is one thing we can figure out. Three times 3,600 bags would be $10,800. That would be the damages [64] if that was the month you took and if that was the market price you took.

The defendant again thinks that the market was higher in that month than the plaintiff does. His

idea was it was $6.75, as you see. So that is going to make the damages less in that month if that is the month you take, and that figure comes out, so the gentlemen have told me, to $8,100 rather than $10,800.

If you accept the line of reasoning that the attorney for the defendant has presented to you, as he has shown you down there at the foot of the board, the damages are $6,000, and we get still another figure. In fact, he says they should be reduced by the number of bags involved at the price per bag, coming to $900.00, which drops it to $5,100.

So you have six possible choices. And the gentleman for the plaintiff who was just speaking took a different view about the bags, so that would make a $7.00 figure.

I don't know whether I am making this very plain to you. It is pretty mixed up, but that is the way these commercial transactions get sometimes.

In the few brief remarks I am going to make I am going to start with the line of reasoning that Mr. Stirling, representing the defendant, presented to you: That the damages should be figured on each month, beginning back in October when [65] the first delivery was to be taken. His theory comes out pretty plainly when you look at those two figures up there. He says that there was no damage in that month because, according to his figure over there, the market was still the $9.00 contract price. And he says that that was the month that this man had agreed to take the corn, and he didn't take it, so

the damages should be computed as of that time for that monthly quota, and so on clear through.

I am not going to say that you have to reject that theory altogether, but I am just going to make this comment, which I feel privileged to do. I think that disregards what the parties were doing. You will find a letter in here written in October where the seller is telling the buyer that he will hold the contract in abeyance. There are some differences here about what "abeyance" means. That just shows you better use a simple word when you can and sometimes you come out better. But we have got that word to deal with, and my idea is that that meant an extension. That is what he was saying: "I am not going to ask you to take deliveries because the market has gotten soft, and we will put off to some indefinite time in the future further discussion about this contract." I read "abeyance" to mean an extension of time. So I don't see how you can say that the damages shall be figured in October when the quota for that month had been extended to a future indefinite time. It seems to me that [66] the correct theory in the case is either in January or February, when the parties squared off to have a row over this and got their affairs in the hands of their lawyers, as you will see from the correspondence. That is the time to take. And you will see, as has been argued to you, that the buyer was taking the position in January which indicated that he claimed the contract had been amended and he was not going to observe it, and then you will find the same thing in February. It seems to me your

choice is between those months. And that then puts you back to a choice between the differing figures that result from the different sides as to what the market was in those months.

Now you will have one form of verdict: "We, the jury in the above-entitled matter, find our verdict for the plaintiffs in the sum of blank dollars."

You will elect a foreman on retiring and you will fill in the amount there in the blank space. Your verdict must be unanimous, as in all cases in this court.

The plaintiffs as to questions of fact that are involved have the burden of proof, as in all litigation. They must satisfy you by a preponderance of the evidence, which means the greater weight of the evidence, as to what the damages were in this case which, the way the case has turned, is the sole issue that is submitted to you for consideration. [67]

You will take the exhibits with you and give them the weight you feel they are entitled to in the jury room. You haven't had a chance to read them, and I have put them all here together in chronological order.

I am going to suggest to Mr. Pierce that he bring you back in here so that you may deliberate here. You can lock up the courtroom, and you can have the blackboard here, which will be necessary for your use.

One of the big things in this case, as often develops, is the difference of opinion which has been expressed here as to what was said and done. In other words, the question of credibility is in-

volved. You have to make up your minds as to where the truth lies in this case as between the conflicting claims as to the matters that bear on the issue. You are the exclusive judges of the credibility of the witnesses and of the weight and value of their testimony.

You may swear Mr. Pierce.

(The Bailiff was sworn and the jury retired from the courtroom, after which the following occurred:)

The Court: Gentlemen, state your exceptions, the jury having retired. First the plaintiff.

Mr. Tassock: The plaintiff has no exceptions, your Honor. [68]

The Court: The defendant?

Mr. Reynolds: The defendant objects to the direction that the jury find a verdict for the plaintiffs, and then objects to the failure of the Court to give the instructions submitted.

Further, we except to the Court instructing on any theory of damages other than the $6,000 or the $5,100 figure based on the computation using the months of October, November, December, January, February and March for the reason that the Court has ruled that the contract was neither modified nor rescinded by the negotiations nor the letter of October 23rd, and it seems to us, therefore, that the effect of that ruling must be to give no effect to those negotiations or letter, which would put us back to the original position of the parties, so that the maximum damages must be arrived at by using

the figures starting with October, either the figures used by the plaintiffs or by the defendant.

The Court: The exceptions have been considered and respectively overruled.

(Whereupon, proceedings in the above-entitled cause on said day were concluded.)

[Endorsed]: Filed December 26, 1956. [69]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrail order, Stipulation re exhibits (Not filed); Plaintiffs' requested instructions (Not filed); Defendant's requested instructions (Not filed); Judgment; Cost bill with notice attached; Motion for order disallowing certain cost bill items; Order sustaining defendant's objections to plaintiffs' cost bill; Notice of appeal; Undertaking on appeal, supersedeas; Designation of contents of record on appeal; Order to transmit exhibits to Court of Appeals; Supplementary designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said Court in a cause therein numbered Civil 8,500, in which H. P. Willman, doing business as Poppers Supply Co., is the defendant and the

appellant and Harold M. Alver, et al., doing business as Premier Popcorn Company are the plaintiffs and appellees; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that there is enclosed herewith exhibits numbered from 1 to 13, inclusive, and the reporter's transcript of proceedings filed in this office in this cause.

I further certify that the cost of filing the notice of appeal, $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 30th day of January, 1957.

[Seal] R. DeMOTT,
Clerk.

By /s/ THORA LUND,
Deputy.

to purchase, and the fact that the contract was held in abeyance for a period of time.

IV.

The Court erred in directing the jury to base damages upon either the January or February, 1954, market price, thereby precluding the jury from considering the market price during October, November and December, 1953.

V.

The Court below erred in failing to give the Defendant's four (4) requested instructions.

VI.

The Court below erred in admitting testimony, from the plaintiff, over defendant's objection, as to what had transpired between the parties with respect to a prior contract (Tr. p. 29), for the reason that such evidence was incompetent, immaterial and irrelevant and highly prejudicial to the defendant.

VII.

The Court below erred in denying defendant's motion for dismissal, which motion was based on the fact that the contract provided certain remedies available to the plaintiff seller, none of which remedies were pursued by the plaintiff in bringing this suit.

/s/ J. P. STIRLING,
Of Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed February 8, 1957.